

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 11, 2014

v

SALATHIEL REZAR BROWN,

Defendant-Appellant.

No. 316648
Wayne Circuit Court
LC No. 12-001235-FC

Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm (felon-in-possession), MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 100 to 150 years in prison for the second-degree murder conviction, 40 to 60 months in prison for the felon-in-possession conviction, and two years in prison for the felony-firearm conviction. We affirm.

I

During voir dire, Juror #2 disclosed that he was acquainted with a female prosecutor, who he identified as “Emily McConnell.” He could not be positive that she worked at the prosecutor’s office, but he knew she was a prosecutor. He explained that he only knew her “socially,” but that their acquaintance would not affect his ability to fairly decide the case. Defendant did not object to Juror #2 and he was added to the panel.

On the fourth day of defendant’s trial, the prosecutor learned that Juror #2 had attended a wine-tasting the night before, during which time Juror #2 mentioned to his prosecutor-acquaintance that he was on jury duty at the circuit court. Outside the presence of the rest of the jurors, the prosecutor brought this issue to the trial court’s attention and the trial court questioned Juror #2:

The Court: Okay. And [Juror #2], have you had some conversations with a member of the Wayne County Prosecutor’s Office?

Juror #2: I know someone from the Prosecutor’s Office, yes.

The Court: Alright. And it has come to our attention that you talked with them last night; is that correct?

Juror #2: I was at a dinner engagement.

The Court: Okay. And what's that person's name?

* * *

Juror #2: Last name is Wolf, and I learned that last night.

The Court: The prosecutor's name is Wolf?

Juror #2: Correct.

* * *

The Court: Okay. Alright. And earlier when we were doing jury selection you were asked about anybody in law enforcement and you said a person's name that you thought might be with the Wayne County Prosecutor's Office, might not. Is that who you were talking about?

Juror #2: Yes.

The Court: Okay. Tell us, give us – Tell us all about what happened and what the event was and everything.

Juror #2: It was a – Her husband, which is why I had the natural, the name wrong.

The Court: Okay.

* * *

Juror #2: He's my stockbroker and he hosted a wine dinner.

* * *

The Court: Okay.

Juror #2: The extent of the conversation was that you know I was in a case, you know. I think she asked if it was Circuit Court, and I said yes. And she said well, we can't talk about it. Essentially, that's it.

The Court: Did you tell her about the case, what kind of case it was?

Juror #2: Um, no. I don't, I don't think so.

The Court: Okay.

Juror #2: She did ask me who the prosecutor was.

The Court: Okay. And who did you – did you say?

Juror #2: I said it was an Indian guy.

The Court: Okay. Did she ask you any other questions other than that?

Juror #2: Um, I don't, I don't recall anything more specific than that.

The Court: Did you talk about that it was a First[-]Degree Murder case or a felony case or anything like that?

Juror #2: I didn't get into the [sic] level of detail.

The Court: And you didn't – did you tell about who the defendant was or the victim or what –

Juror #2: No, sir.

* * *

The Court: . . . Sir, have you discussed any of this conversation with any of the other jurors?

Juror #2: I have not.

The Court: You haven't told them anything about what happened last night or anything?

Juror #2: No, sir.

The trial court dismissed Juror #2 and the trial proceeded.

II

Defendant argues that the trial court erred by declining to question the remaining jurors regarding any potential undue influence after Juror #2 was dismissed, and that his trial counsel was ineffective for failing to object to the court's failure to follow-up with the remaining jurors. We disagree.

A

An unpreserved constitutional error “is not a ground for reversal unless the defendant can demonstrate that the error was plain, that it affected the outcome, and that it resulted in the conviction of an actually innocent person or ‘seriously affected the fairness, integrity or public reputation of judicial proceedings.’ ” *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008), quoting *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

A criminal defendant has a constitutional right to be tried by an impartial jury. US Const, Am VI; Const 1963, art 1, § 20. However, jurors are presumed to be impartial “ ‘until the contrary is shown.’ ” *Miller*, 482 Mich at 550, quoting *Holt v People*, 13 Mich 224, 228 (1865). A trial court may dismiss a juror for committing misconduct, but a new trial is only required where a “ ‘fair and impartial trial was not had’ ” by the complaining party. *Id.* at 551, quoting *People v Nick*, 360 Mich 219, 230; 103 NW2d 435 (1960). A defendant must provide evidence that a juror is not impartial. *Id.* at 553. At the very least, a defendant must show that “ ‘the juror’s impartiality is in reasonable doubt.’ ” *People v Rose*, 289 Mich App 499, 529; 808 NW2d 301 (2010), quoting *Miller*, 482 Mich at 550.

In *People v Jackson*, 292 Mich App 583, 593; 808 NW2d 541 (2011), a juror was dismissed on the second day of trial after complaining of stress and being too overwhelmed to continue serving on the panel. “The trial court questioned her about what she may have said to the other jurors about her situation, and she indicated only that she had told them that she felt frustrated and had been unable to sleep. Without objection by any party, the trial court dismissed the juror without further questioning and continued the trial without questioning the remaining jurors.” On appeal, the defendant argued the trial court should have questioned “the remaining jurors to determine whether the dismissed juror may have said or done anything to taint them.” But because the trial court’s questioning of the dismissed juror did not reveal any information that the remaining jurors were “exposed to improper influences or that their ability to render a fair and impartial verdict had been compromised,” this Court determined the trial court’s failure to question the remaining jurors was not plain error.

Here, Juror #2 testified that he did not disclose his conversation with his prosecutor-acquaintance to any of the jurors. The remaining jurors were presumed to be impartial, *Holt*, 13 Mich at 228, and, just as in *Jackson*, defendant has failed to prove otherwise where there is no evidence Juror #2 did or said anything to taint the remaining jurors. *Id.*; *Rose*, 289 Mich App at 529. Defendant has therefore failed to establish that the trial court plainly erred by proceeding with trial without questioning the remaining jurors.

We further disagree with defendant’s unpreserved argument that the failure to question the remaining jurors is structural error requiring automatic reversal. “Structural errors are defects that affect the framework of the trial, infect the truth-gathering process, and deprive the trial of constitutional protections without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.” *People v Watkins*, 247 Mich App 14, 26; 634 NW2d 370 (2001). Structural errors have only been found in a “ ‘very limited class of cases.’ ” *People v Duncan*, 462 Mich 47, 52; 610 NW2d 551 (2000). Defendant has not demonstrated that he was denied the constitutional right to a trial by an impartial jury. *United States v Martinez-Salazar*, 528 US 304, 316; 120 S Ct 774; 145 L Ed 2d 792 (2000). Where Juror #2 testified that he did not disclose his conversation with his prosecutor-acquaintance to any of the jurors, there is no indication that questioning the remaining jurors would have had any impact on the framework of the trial, *Watkins*, 247 Mich App at 26, or that the failure to question the jurors constitutes one of the limited circumstances requiring automatic reversal, *Duncan*, 462 Mich at 52.

B

“Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). “[A] trial court’s findings of fact are review for clear error” and “[q]uestions of constitutional law are reviewed by this Court de novo.” *Id.*

Both the United States and Michigan Constitutions provide the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. “There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel’s performance was sound trial strategy.” *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011). To adequately prove a claim of ineffective assistance of counsel, a defendant must prove (1) that counsel’s performance fell below an objective standard of reasonableness, and (2) “that there is a reasonable probability that the outcome of the trial would have been different but for counsel’s performance.” *People v Roscoe*, 303 Mich App 633, 643-644; 846 NW2d 402 (2014).

Defendant contends that his trial counsel was ineffective for failing to object to the trial court’s failure to question the remaining jurors after the dismissal of Juror #2. However, this Court has held that counsel is not ineffective for failing to make to a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). Because the trial court was not required to question the remaining jurors in this circumstance, *Jackson*, 292 Mich App at 593, and the presumption of impartiality of those jurors had not been tainted, any objection to the failure to question the jurors would have been futile and defendant has failed to establish he was denied the effective assistance of counsel.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood